



**Kithangari & 4 others v Mutahi (Application E024 of 2024)
[2024] KESC 72 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KESC 72 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION E024 OF 2024

MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM, I LENAOLA & W OUKO, SCJJ

NOVEMBER 29, 2024

BETWEEN

**ALEX NJUE KITHANGARI 1ST APPLICANT
MURIITHI KITHANGARI 2ND APPLICANT
PETERSON MUGO KITHANGARI 3RD APPLICANT
NJERU TETU 4TH APPLICANT
KATHANGARI KING' ANGI 5TH APPLICANT**

AND

BENSON GICHOHI MUTAHI RESPONDENT

(Being an application for extension of time to lodge a Notice of Appeal against the judgment of the Court of Appeal at Nyeri (J. Mohammed, Kimaru & Muchelule J.J.A) dated 7th June, 2024 in Civil Appeal No. 105 of 2021)

Conditions under which the Supreme Court would exercise its discretion to extend the time in filing an appeal

The applicants sought leave to file their Notice of Appeal out of time following a Court of Appeal decision that overturned a ruling in their favor. They attributed the delay to their advocate’s inaction, requiring them to seek new representation, which further delayed their filing. The respondent opposed the application, arguing that the delay was inordinate, unexplained, and unjustified. The Supreme Court held that the applicants failed to provide compelling reasons for the delay or evidence of diligence in pursuing the appeal. Consequently, the court dismissed the application and declined to extend time for filing the Notice of Appeal.

Reported by John Ribia

Civil Practice and Procedure – appeals – application for leave to file an appeal out of time - what were the conditions under which the Supreme Court would exercise its discretion to extend the time in filing an appeal - whether the applicants’ reliance on the alleged inaction and unresponsiveness of their advocates as the ground for



filing an appeal out of time constituted a reasonable ground for delay in filing the Notice of Appeal - what did the Supreme Court consider in determining if there was inordinate delay in filing of an appeal - Constitution of Kenya articles 159(2)(d) and 163(4); Supreme Court Rules (cap 9B) rule 15(2) and 36(1).

Brief facts

The applicants sought an extension of time to file a Notice of Appeal before the Supreme Court following a judgment by the Court of Appeal on June 7, 2024, in Civil Appeal No. 105 of 2021 at Nyeri. The Court of Appeal had overturned the decision of the Meru Environment and Land Court (ELC) in Case No. 75 of 2019, which had dismissed the respondent's suit and allowed the applicants' counterclaim. Dissatisfied with the appellate court's ruling, the applicants intended to appeal to the Supreme Court but failed to file their Notice of Appeal within the required 14 days under rule 36(1) of the Supreme Court Rules, 2020.

On August 28, 2024, the applicants filed the present application, seeking leave to file the Notice of Appeal out of time and for the annexed draft Notice of Appeal to be deemed as duly filed. They attributed the 68-day delay to inaction by their initial advocate, who failed to proceed with the appeal. Their second advocate was unresponsive despite being paid, and by the time they engaged a third advocate, they lacked sufficient resources.

The respondent opposed the application, arguing that the delay was unjustified and inordinate. He contended that the applicants had not demonstrated due diligence in following up on their case and had only acted after being served with the Court of Appeal's order. The respondent also argued that the applicants had not indicated under which limb of article 163(4) of the Constitution they sought to appeal, nor had they demonstrated that their intended appeal was arguable.

Issues

- i. What were the conditions under which the Supreme Court would exercise its discretion to extend the time in filing an appeal?
- ii. Whether the applicants' reliance on the alleged inaction and unresponsiveness of their advocates as the ground for filing an appeal out of time constituted a reasonable ground for delay in filing the Notice of Appeal.
- iii. What did the Supreme Court consider in determining if there was inordinate delay in filing of an appeal?

Held

1. The principles to be considered in determining an application for extension of time as follows:
 1. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
 2. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
 3. whether the court should exercise the discretion to extend time, was a consideration to be made on a case to case basis;
 4. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. whether there would be any prejudice suffered by the respondents if the extension was granted;
 6. whether the application had been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
2. Rule 36(1) of the Supreme Court Rules provided that a person who intended to make an appeal to the Supreme Court shall file a notice of appeal within 14 days from the date of judgment or ruling which was the subject of appeal. The instant application was filed more than two months after the delivery of the Court of Appeal judgment.
3. In determining whether there was inordinate delay, the focus should not be on the length of the delay *per se*, but also on the justification and reasons, which in turn must be rational and plausible.



The reasons given by the applicants for the delay in filing the Notice of Appeal within time was that the same was caused by inaction and unresponsiveness on the part of the advocates they had instructed to proceed with the appeal. However, no evidence had been placed before the Supreme Court to substantiate those averments. Additionally, they had not demonstrated any efforts made through correspondence to follow up on their advocates whom they averred were unresponsive after being paid the legal fees.

4. No satisfactory explanation and justification had been given for the delay. The delay was inordinate and underserving of the Supreme Court's discretion to extend the time to file the Notice of Appeal.

Application dismissed.

Orders

Each party was to its own costs.

Citations

6 .Kithangari & 4 others v Mutahi (Application E024 of 2024) [2024] KESC 72 (KLR) (29 November 2024) (Ruling)

Cases

1. Gaciani & 11 others v Kimanga & another (Application E004 of 2023; [2023] KESC 23 (KLR) — (Followed)
2. Karani v Judicial Service Commission (Petition 3 of 2021; [2022] KESC 37 (KLR)) — (Explained)
3. Kenya Agricultural Research Institute v Kariuki & 16 others Application E001 of 2023; [2023] KESC 25 (KLR) — (Explained)
4. Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya (Petition 4 of 2020; [2022] KESC 16 (KLR)) — (Explained)
5. Mwangi , Henry Mukora v Charles Gichina Mwangi, Civil App No 26 of 2004 – (Explained)
6. Rai & 3 others v Rai & 4 others Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 — (Followed)
7. Salat v Independent Electoral and Boundaries Commission & 7 others Application 16 of 2014; [2014] KESC 12 (KLR) — (Explained)
8. Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others Petition 18 (E020) of 2022; [2023] KESC 106 (KLR) — (Explained)
9. Waruhiu v Munene & another Civil Application 18 of 2020; [2021] KESC 42 (KLR) — (Followed)

Statutes

1. Constitution of Kenya, 2010 — articles 159(2)(d); 163(4) — (Interpreted)
2. Supreme Court Rules (cap 9B) — rules 15(2); 36(1) — (Interpreted)

Advocates

Ms. Alice Ndung'u holding brief for Mrs. Makworo for Applicants

Mr. Ebenezer Mutisya holding brief for Mr. Charles Kanjama, SC for Respondent

RULING

Representation:

Ms Alice Ndung'u holding brief for Mrs Makworo for the applicants

(Muthike & Makworo Advocates)

Mr Ebenezer Mutisya holding brief for Mr Charles Kanjama, SC, for the respondent



(Muma & Kanjama Advocates)

1. Upon perusing the notice of motion dated 28 August 2024 and filed on 16 September 2024 by the applicants pursuant to article 159(2)(d) of the Constitution; and rules 15(2) and 36(1) of the Supreme Court Rules, 2020 seeking leave to file their notice of appeal out of time, and to have the annexed draft of their notice of appeal be deemed as duly filed upon payment of the requisite fee; and
2. Upon reading the grounds on the face of the application and the supporting affidavit of Muriithi Kithangari, the 2nd applicant, sworn on his own behalf and that of his co-applicants on 28 August 2024, where he avers that: on 7 June 2024 the Court of Appeal at Nyeri, in Civil Appeal No 105 of 2021 delivered a judgment setting aside the decision of the Meru Environment and Land Court (ELC) in Case No 75 of 2019 wherein the ELC had dismissed the respondent's case and allowed the applicants' counterclaim; dissatisfied with the judgment of the Court of Appeal, the applicants intend to file an appeal before this court; and
3. Considering the applicants' contention that: the delay in filing the notice of appeal was not intentional but was caused by inaction on the part of the advocate whom they had instructed to proceed with the appeal; as a result of the inaction of the advocate, they sought the services of another advocate to file the appeal who sought time to go through the file first, however, the said advocate was thereafter unresponsive to their calls whereas they had already paid the required legal fees; consequently they sought the services of another advocate. However, by the time they obtained resources to procure the services of another advocate, the time to file the appeal had lapsed; the delay is not intentional nor is it inordinate; and that it is in the interest of justice that the application be allowed as prayed; and
4. Further reading the applicants' submissions dated 10 September 2024 in support of the application wherein they aver that: the respondent obtained the title to the land parcel Reference No Mbeere/Kirima/3066 while the applicants were still in occupation; the respondent evicted the applicants from the suit property before the appeal was heard; the respondent is in actual possession of the suit property hence the respondents will not suffer any prejudice if the application is allowed. In support of their case they rely on this court's decision in Nicholas Kiptoo Arap Salat v IEBC & 7 others [2014] eKLR (Nicholas Salat case) and the Court of Appeal in Henry Mukora Mwangi v Charles Gichina Mwangi, Civil App. No. 26 of 2004, and state that their delay in filing the Notice of Appeal is for one month, twelve days only which is not inordinate; and
5. Taking Into Account the respondent's replying affidavit sworn on 20 September 2024 in response and in opposition to the application wherein he contends that: extension of time is not a right of a party and is only available to a deserving party at the discretion of the court; the law requires the applicants to provide compelling reasons to justify the inordinate delay of 68 days in filing the notice of appeal; the delay has not been satisfactorily explained by the applicants; the reasons given by the applicants are neither reasonable nor credible as no evidence has been adduced to support the applicants' averments; the remedy lies against their erstwhile advocates for professional negligence; the applicants have been aware of the Court of Appeal judgment; the applicants have been indolent, and were only prompted to file the application after being served with the Court of Appeal order issued on 30 July 2024; and
6. Further considering the respondent's averments that: the applicants have neither indicated under which limb of article 163(4) of the Constitution they intend to file their appeal nor have they demonstrated any prospects that the intended appeal is sustainable on the jurisdiction invoked. Further, the respondent stands prejudiced for reasons that: the applicants subdivided the subject property pursuant to the judgment and decree of the ELC Case No 75 of 2019 and obtained new titles to the resultant subdivisions during the pendency of the appeal before the Court of Appeal; and



that the Court of Appeal had later set aside the Judgment and Decree of the ELC in favour of the respondent; and

7. Considering the respondent's submissions dated 20 September 2024 where he relies on this court's decisions in the *Nicholas Salat case*, *Arvind Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* SC Pet No 18 (E020) of 2022; *Karinga Gaciani & 11 others v Ndege Kabibi Kimanga & ano* SC Appl No E004 of 2024; and *KARI v Peter Wambugu Kariuku & 16 others* SC Appl No E001 of 2023 [2023] KESC 25 (KLR) to urge that the applicants are undeserving of extension of time to file the notice of appeal as they have failed to provide a sufficient and justifiable reason for the inordinate delay, and that litigation must come to an end; and
8. Bearing in mind the provisions governing the filing of a notice of appeal set out under rule 36, and computation and extension of time provided under rule 15 of the *Supreme Court Rules*, 2020 including this court's numerous decisions on extension of time;
9. We have considered the application, affidavit in support, the responses and submissions filed and now opine as follows:
 - i. In the *Nicholas Salat case*, this court set out the principles to be considered in determining an application for extension of time as follows:
 - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
 - ii. Rule 36(1) of the *Supreme Court Rules* provides that a person who intends to make an appeal to this court shall file a notice of appeal within fourteen (14) days from the date of judgment or ruling which is the subject of appeal. In the instant case, the Court of Appeal judgment, the subject of the intended appeal was delivered on 7 June 2024 while the instant application was electronically filed on 28 August 2024, which is more than two months after the delivery of the Court of Appeal judgment.
 - iii. Although not in relation to the filing of a notice of appeal, in *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya* (Petition 4 of 2020) [2022] KESC 16 (KLR) in determining whether there is inordinate delay we held that, “[143] the focus should not be on the length of the delay per se, but also on the justification and reasons, which in turn must be rational and plausible.” Similarly, in *Karani v Judicial Service Commission* (Petition 3 of 2021) [2022] KESC 37 (KLR) we held that “[119]



...Where there is delay, the court must interrogate whether the same is justifiable and thus excusable, or not. In order to do that, the court must interrogate the circumstances of the case.”

- iv. The reasons given by the applicants for the delay in filing the notice of appeal within time is that the same was caused by inaction and unresponsiveness on the part of the advocates they had instructed to proceed with the appeal. We, however, note that no evidence has been placed before us to substantiate these averments. Additionally, they have not demonstrated any efforts made through correspondence to follow up on their advocates whom they aver were unresponsive after paying the legal fees. As we held in *Gaciani & 11 others v Kimanga & another* (Application E004 of 2023) [2023] KESC 23 (KLR) “Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due diligence, through evidence or correspondence of the follow up with the advocates or to pursue their rights as we found in *George Kang’ethe Waruhiu v Esther Nyamweru Munene & another* Civil Application No 18 of 2020 [2021] eKLR. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.”
 - v. Noting that the notice of appeal ought to have been filed on or before 21 June 2024 the instant application has been filed 68 days after the said date. No satisfactory explanation and justification have been given for the delay. We therefore find that the delay is inordinate and underserving of this court’s discretion to extend the time to file the notice of appeal. With this finding, the prayer to deem as filed the attached notice of appeal is rendered superfluous.
 - vi. We set out the guiding principles on the award of costs in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup. Ct. Petition No 4 of 2012; [2014] eKLR. Costs follow the event. However, the award of costs is discretionary. To this end, each party shall bear their own costs.
10. Consequently, for reasons aforesaid, we make the following orders:
- i. The notice of motion application dated 28 August 2024 be and is hereby dismissed;
 - ii. Each party shall bear their costs of the application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2024.

.....
**M. K. KOOME CHIEF JUSTICE &
PRESIDENT OF THE SUPREME COURT**

.....
**P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE COURT PRESIDENT OF THE SUPREME COURT**

.....
**M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT**



.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

